No. 4027

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HOWARD AUTOMOBILE COMPANY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

BRIEF FOR APPELLANT

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THE FACTS

This is an appeal from an order of the United States District Court for the Northern District of California, denying the relief sought by the intervenor there and appellant here, Howard Automobile Company, through a petition for the return of personal property; or in lieu of the return thereof, the establishment of a lien in favor of petitioner upon the proceeds derived from the sale of said personal property, the said petition in intervention having been filed in the proceeding entitled "United States of America versus E. O. Kildall, *et al,*" No. 12296 upon the records of said Court.

Said intervening petition (R2) shows that on June 2, 1922, an agreement, generally known as a contract of conditional sale, or a conditional sales

contract, was entered into between Howard Automobile Company, and one E. O. Kildall, for the purchase by the latter from Howard Automobile Company of an automobile, of a model known as a "Buick Roadster", and which was particularly described in said contract, a copy of which is attached to the intervening petition (R6).

The purchase price agreed upon was $978.60. At the time the contract was executed, the sum of $378.60 was paid by Kildall to the vendor, Howard Automobile Company. The balance of the purchase price, it was agreed should be paid in monthly installments. The vendor reserved to itself title to said automobile until the full amount of the agreed purchase price was paid, upon which event the automobile, by the terms of the contract, was to become the absolute property of Kildall; but, by the terms of the contract, Kildall was entitled to immediate possession of the automobile and he was entitled to possess and control the same at all times from the date of the contract so long as he made the installment payments and observed the conditions of the contract.

On the date the contract was executed, June 2, 1922, Kildall took possession of the automobile and thenceforth it was under the control of Kildall.

The transaction, as is the case in the great majority of instances when automobiles are sold upon installment payment terms—and it is matter of

common knowledge that large numbers of automobiles are so sold—did not differ materially from a transaction wherein a part of the purchase price is paid at the time of delivery and a chattel mortgage upon the automobile is taken by the vendor to secure payment of the balance of the purchase price. It differed not at all as to any control of the automobile by the vendor, so long as the vendee observed the conditions of the contract.

The intervening petition (R2) states that at the time said automobile was entrusted to the care and custody of Kildall, the petitioner, Howard Automobile Company, had no knowledge or information, nor had the petitioner at that time or subsequently —until the arrest of said Kildall, as hereinafter set forth—any notice or information, nor had petitioner suspected, that at the time said automobile was entrusted to Kildall, or subsequently, that Kildall intended to use or was using said automobile in unlawfully transporting intoxicating liquor.

From the time of the delivery of the automobile until the arrest of Kildall, he made the payments provided for in the said contract and performed the conditions thereof; so that during that time he was entitled to retain undisturbed possession and full control of the automobile and the Howard Automobile Company could not have exercised any control over it. The charge upon which Kildall was arrested was for a first offense and there is no pretense that he was a known offender against the National Prohibition Act.

In the month of October, 1922, Kildall and a companion were arrested for the illegal transportation of intoxicating liquor, and the said automobile was seized by the prohibition enforcement officers.

At said time there remained due to Howard Automobile Company, as the balance of the purchase price of the said automobile, the sum of $458.60. No payments on account thereof have since been made, and the said $458.60 is still unpaid.

In December, 1922, Howard Automobile Company, filed its intervening petition and prayed an order restoring it to possession of said automobile, or, in lieu thereof, for an order establishing a lien in favor of petitioner upon the proceeds realized from the sale of said automobile to the amount of $458.60. (The statement in the opinion of the District Court (appendix) to the effect that the petition asked for the *return* of the automobile only, is incorrect—see prayer of petition (R5.)

Subsequent to the filing of this petition, Kildall entered a plea of guilty, and was sentenced to pay a fine.

Thereupon the United States Attorney filed a purported answer (R9) to said intervening petition. This document did not deny or traverse any of the statements or allegations of the petition. On the contrary, it contained merely a statement, which if true, would establish the guilt of Kildall of illegally transporting intoxicating liquor; but, it

in nowise alleged any guilt or guilty knowledge on the part of petitioner, Howard Automobile Company.

At no stage in the proceedings in the District Court was there any attempt by the Government, by pleadings, by affidavits, by the introduction of testimony, or otherwise, to show any guilt, possession of guilty knowledge or fault of any character on the part of the petitioner, Howard Automobile Company.

The said intervening petition and its accompanying affidavit, together with the purported answer of the Government thereto, was submitted to the District Court, and on April 14, 1923, the Court made an order denying the prayer of the intervening petitioner for the return of said automobile and refusing to establish any lien in favor of the intervening petitioner upon the proceeds to be derived from the sale of said automobile.

ARGUMENT

1. Nothing to be found in the laws of California demands a disposition of causes of this character different from that made in other jurisdictions.

In the case of *United States vs. Sylvester, 273 Fed. 253,* the United States District Court for Connecticut, in a case similar in all respects to the instant one, says:

> "What, then, is to become of the interest of the conditional vendor or the interest of the mortgagee? Are such persons to lose their interest in the vehicle or the value of their property right? The answer is a negative one, and is found in the provisions of Section 26, which guard against such loss, as far as possible."

The pertinent provision of Section 26 of the National Prohibition Act are as follows:

> "Whenever intoxicating liquors transported * * * illegally shall be seized by an officer he shall take possession of the * * * automobile * * * and shall arrest the person in charge thereof. * * * The court, upon conviction of the person so arrested shall order the liquor destroyed, *and unless good cause to the contrary is shown by the owner,* shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which

> are established, by intervention or otherwise, at said hearing or in other proceedings brought for said purpose, as being *bona fide* and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor."

The District Court for Connecticut, in applying the provisions of the statute follows the well-established rule of giving effect to *the whole.* It recognizes that the law intends to protect innocent persons from unnecessary and unjust loss, and recognizes that the vendor under a conditional sales contract, as well as the mortgagee, is entitled to protection, as, indeed, the very letter of the law provides.

The District Court in the instant case cites six California decisions which hold, in effect at least, that the vendor in a contract of conditional sale is the owner of the chattel sold until all the terms of the contract to be performed by the vendee are fulfilled—and, the Court says:

> "It is clear to me, therefore, that at least in California, the following conclusions are inevitable:
>
> 1. The vendor under a conditional bill of sale retaining title to the property in himself cannot compel the return of the property by the Government.

2. Such a vendor has no lien upon such a vehicle for the very simple reason that he is the owner thereof."

From which it may be fairly inferred that the District Court is of the opinion that the status assigned by state laws to a vendor under a conditional sales contract may govern his rights under Section 26 of the National Prohibition Act, and that he might have rights to protection in some jurisdictions, whereas he has none in others.

We are well aware that the decision of the Court in *United States vs. Sylvester* is not binding upon the District Court of California, but it should have sufficient persuasive weight to warrant the inquiry whether a difference in State laws justifies two diametrically opposing decisions in similar circumstances by courts of the same judicial system. The examination can perhaps be most quickly made by setting out a few of the chief characteristics of conditional sales contracts and the propositions of law applicable.

a. The validity of conditional sales contracts is well settled.

b. The nature of the contract is to be determined by all its terms—calling it a "lease", a "mortgage", etc., does not affect its character.

c. Title to thing sold remains in vendor until vendee has complied with terms of contract. Vendor in meanwhile is the owner of the chattel.

d. Upon breach of vendee, vendor has two remedies—he may repossess the chattel or sue for the amount due.

e. Having two remedies, vendor must choose one; he cannot pursue both.

Having set out these few propositions—we do not consider this phase of sufficient importance, as will appear later, to occupy the time of the Court with more—let us see if there is any difference between the laws of California and Connecticut which would warrant the chasm between *United States vs. Sylvester* and this case. *The difference is not to be found.* There is not to be found a distinction in the decisions of the two states. Taking the propositions in the order above given, we have the following paralleling decisions:

a. *Liver vs. Mills, 155 Cal. 459;*
Greene vs. Carmichael, 24 Cal. App. 27;
Cooley vs. Gillan, et al, 54 Conn. 80.

b. *The Parke & Lacy Co. vs. The White River Lumber Co., 101 Cal. 37;*
Kohler & Chase vs. Hayes, 41 Cal. 585;
Miller vs. Steene, 30 Cal. 402;
Hine vs. Roberts, 48 Conn. 267;
Loomis vs. Bragg, 50 Conn. 228;
Bohmann vs. Perrett, 97 Conn. 571.

c. *Potts Company vs. Benedict, 156 Cal. 322;*
Waltz vs. Silveria, 25 Cal. App. 717;
Henry Lewis, et al vs. McCabe, et al, 49 Conn. 141.

d. *Holt Mfg. Co. vs. Ewing, 109 Cal. 353;*
Muncy vs. Brain, 158 Cal. 300;
Adams vs. Anthony, 178 Cal. 158;
Appleton vs. Norwalk, etc., 53 Conn. 4;
Crompton vs. Beach, 62 Conn. 25;
Alfred Fox Piano Co. vs. Bennett, 96 Conn. 448.

e. *Parke & Lacy Co. vs. White River Lumber Co., supra;*
Holt Mfg. Co. vs. Ewing, supra;
Muncy vs. Brain, supra;
Hughes vs. Kelly, 40 Conn. 148;
Griffin vs. Ferris, 76 Conn. 221.

As there exists no difference between the law relating to conditional sales contracts in California and Connecticut, the decisions in *United States vs. Sylvester* and that in the case at bar cannot be reconciled on that score. In fact, we do not believe that they can be composed at all, and it is our view that the quotation above from the Sylvester decision is the correct interpretation of Section 26 of the National Prohibition Act, and expresses the intent of the Congress that enacted it, and that the decision in this case does not. The conclusion is forced upon us in small part only by what we have disclosed as to the laws of the respective states, and which would be found in comparison of the laws of almost any other states, but mainly by what appears to us to be

more pertinent features of the case, to which we will now pass.

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2. State laws do not constitute a rule of decision in causes of this nature, nor can the status of a party or his rights in such cause be defined by reference to state laws.

Section 721, Revised Statutes;
Section 1538, Compiled Statutes.

"The laws of the several states, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."

This is also the language of Section 34, Chapter 20 of the Act of September 24th, 1789, and it is therefore, the statute that was under consideration in *Swift vs. Tyson, 16 Peters 1* and *Bucher vs. Cheshire R. R. Co., 125 U. S. 610,* and the numerous decisions intermediate of the two and subsequent to the last mentioned case.

Some jurists have observed that these decisions are not always harmonious. Be that as it may, we think that whatever want of accord may exist relates to governing force of State laws in actions at common law, and that it has never been held that State laws form rules of decision in Federal Courts in the interpretation of statutes of the United States, in equity or in criminal prosecutions.

This cause is not an action at common law. It is an appeal for equitable relief in a proceeding authorized by a statute of the United States.

Federal statutes must be interpreted by Federal Courts, irrespective of State decisions.

Calhoun Gold Mining Co. vs. Ajax Gold Mining Co., 182 U. S. 499;

West Virginia vs. Adams Express Co., 219 Fed. 794.

In *Calhoun Gold Mining Co. vs. Ajax Gold Mining Co., supra,* the Supreme Court says in refusing to give countenance to a decision of the Supreme Court of Colorado:

> "There is serious objection to accepting the consequence as determinative of our judgment. We might by so doing confirm titles in Colorado, but we might disturb them elsewhere. The statute construed is a Federal one, being a law not for Colorado, but for all the mining States, and, therefore, a law for all, not a rule for one, must be declared * * * The court must interpret the statute independently of local considerations."

The National Prohibition Act is a law for all the states. By every reason, it must be interpreted independently of local State laws.

State laws are not regarded in suits in equity in Federal Courts.

Neves vs. Scott, 13 How. 268;

Russell vs. Southard, 12 How. 139;

Boston, etc. vs. Slocum, 77 Fed. 345;
Butler et al vs. Douglass, 3 Fed. 612;
Johnston vs. Roe, 1 Fed. 692.

State laws do not constitute a rule of decision in criminal prosecutions in United States Courts.

Bucher vs. Cheshire R. R. Co., supra;
U. S. vs. Reid, 12 How. 361;
U. S. vs. Hall, 53 Fed. 352;
Logan vs. U. S., 144 U. S., 302;
U. S. vs. Jones, 10 Fed. 469.

Therefore, if the view should be taken that the proceeding instituted by petitioner in the District Court was part of a criminal prosecution, State laws could not be resorted to to determine petitioner's status or classification nor any rights or disabilities which it may have in that proceeding.

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3. If a law is capable of more than one interpretation, Federal Courts will select that construction which is most equitable and just.

It has been seen that two very different interpretations of the same section (Section 26) of the National Prohibition Act have been indulged in by judges of two United States District Courts. We think it has been made to appear that this difference is in nowise called for or compelled by any controlling force which local State laws may exercise upon the decision of Federal Courts in causes of this character. Plainly, the Federal Courts are left in an en-

tirely independent position as regards state influence in interpreting and applying the provisions of a Federal statute.

Assuming that the statute is capable of more than one interpretation, which shall it be—one that seeks in the words of the written law authority to deal justly with the innocent, to protect such persons in their property rights and prevent unnecessary loss to them so far as may be, or, one that by strained construction, by disregard of the language of the statute, by unwarranted assumptions as to the legislative intent, attempts not to deal as justly as may be with the innocent, but hands out forfeiture, confiscation and causes unnecessary and destruction loss to those who are guilty of no more than having been engaged in a very large and important business in this country, and having employed in that business methods long sanctioned by the laws of every State in this nation?

The instruments to choose from are ready made in the decision of *United States vs. Sylvester, supra,* and in the decision in this case in the Court below as well as the decision of the United States District Court for Arizona in the case of *United States vs. Marshall Montgomery,* designated upon the records of that Court as C-448.

The Montgomery case appears to have largely influenced the decision of the Court below, for it quotes from it and approves the following language:

> "It is not unreasonable to suppose that Congress had in mind the fact that an owner may determine who shall have the use of a vehicle and thus, in a measure, control such use, while a lienor may not, because he is at no time entitled to its possession."

The quoted language was used by the District Court for Arizona in deciding a case similar to this, so the "owner" referred to is, as is the petitioner here, the vendor under a conditional sales contract.

With the conclusions of the Court we respectfully but very decidedly differ.

It is unreasonable to suppose that the Congress in enacting Section 26 of the National Prohibition Act, which deals largely with the subject of vehicles used in the illegal transportation of liquor, was entirely ignorant of the business methods of one of the country's largest industries—the automotive industry. It is unreasonable to suppose that the Congress was entirely ignorant of the fact that conditional sales contracts are largely employed in the sale of automobiles—that probably one-half, or more, of all automobile sales were effected upon such contracts. It is unreasonable to suppose that Congress was entirely ignorant of the characteristics of a business instrument such as the conditional sales contract, which is so extensively used not only in the automotive industry, but which has been used for half a century or more in almost unenumerable other industries in this country. It is unreasonable to sup-

pose that Congress did not know that the chief office of the conditional sales contract, like the chattel mortgage, was to secure the vendor in the collection of the balance due upon the purchase price of the article sold. It is unreasonable to assume that the Congress did not know that upon the execution of such a contract, the vendor delivered the article sold into the possession of the vendee, and that from that time on the vendor had no more control or right of control over the chattel than a mortgagee under a properly worded chattel mortgage would have.

Upon a breach of a conditional sale contract, by the vendee, the vendor may repossess the chattel or sue for the balance due. Upon the breach of the conditions of a chattel mortgage, the mortgagee may take possession of the chattel covered by the mortgage, or he may sue for the amount due. The only difference in the position of the two parties is that if the conditional sales vendor repossess the property, it is his without further procedure, because he has never parted with the title, whereas the mortgagee must foreclose the mortgagor's interest in the property before he can obtain title. *A mere difference in procedure after breach by the vendee, but no difference in the amount or degree of control of the property that may be exercised by the vendor or mortgagee before any breach occurs.*

It is unreasonable to suppose that the Congress was ignorant of this situation.

It is unreasonable to suppose that the Congress, knowing the similarity in interests between those of conditional sales vendor and chattel mortgages, would take pains to protect the interests of the latter and leave those of the conditional sales vendor—by far the more numerous class—subject to forfeiture and confiscation without hope of redress.

In the decision in the Montgomery case, above referred to, the Court also says:

> "I am, therefore, of the opinion that an owner while retaining title in himself delivers a car on conditional sale with power to use it in any way that the buyer may desire cannot escape a forfeiture if the buyer uses it unlawfully, by claiming that such unlawful use was without his knowledge."

We contend that this conclusion is contrary not only to the intent, but to the very language of the National Prohibition Act. By Section 26 of the Act the Court "shall order the vehicle to be sold, *unless good cause to the contrary is shown by the owner.*"

An owner, among laymen as well as lawyers, is considered to be, according to this country's best known lexicographer—Webster:

> "One who has the legal or rightful title, whether he is in the possession or not."

Unless the contrary appear—and it does not appear in the case of Section 26—that words are used

in a different meaning, their ordinarily accepted meaning must be accorded them.

Therefore, from the well-understood meaning of the word "owner", as well as the knowledge that the Congress must have had of the characteristics of conditional sales, and from the context of the section itself, it is plain that the "owner" referred to in Section 26 of the National Prohibition Act is not restricted to an owner in possession, *but to an owner in the fullest meaning that our language accords to the word.*

Manifestly the statute cannot refer to an owner in actual possession. In that case he would be the person guilty of illegally transporting liquor, and he could show no cause whatsoever why the vehicle should not be confiscated. It is impossible to suppose that the Congress intended to provide for such a burlesque situation.

If it means an owner who has voluntarily parted with possession of the vehicle—such as lent it—he cannot, during the duration of the loan, exercise any more actual control over the use and movements of the vehicle than can the conditional sales vendor. If he accompanies the vehicle and controls its use, and it is employed to illegally transport liquor, the owner is a co-defendant, and in no better position to show "good cause" than if he had been operating alone.

If the Court's conclusions are to be accepted, it would restrict the "owner" who can show "good

cause'' to one from whom the vehicle has been stolen and then used for the illegal transportation of liquor, which is to assume that the Congress took pains to protect a few isolated owners to whom such a contingency might happen, and left the thousands of conditional sales vendors to the ''mercy'' of confiscation, and in the very same section of the Act provided protection for the interests of the mortgagee.

The fact that the ''owner''—the conditional sales vendor—may sue the vendee for the balance due, is not an answer to our contention, nor should it favorably address itself to the conscience of the Court.

The statute gives to the owner a remedy to which he is entitled. This cannot be taken away on the ground that he can recover judgment against the vendee for the amount still unpaid.

Conditional sales contracts are exacted from purchasers of automobiles because they either have not the means to pay, at one time, the entire purchase price, or their property is in such condition that they are not considered sufficiently solvent for an open credit. A money judgment against many of these vendees would be worthless. Such a judgment against those who have become so shiftless and reckless as to engage in illicit liquor traffic would in almost every instance be so. If it had been the intention of the lawmakers that this should be the only remedy of the conditional sales vendor, why was any provision made to protect the chattel mortgagee? He also can sue upon his note. It is incon-

ceivable that two men in practically the same situation should be so differently dealt with—one of them so unjustly.

It is our contention that such restricted application is unwarranted; that it ignores the meaning of the statute; that it is not in accord with the manifest intent of is framers and that it violates the principles of satutory construction enunciated by our Courts.

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4. The District Court, in determining this cause has placed a construction upon the National Prohibition Act that is not warranted by its terms, and has employed standards of interpretation that are contrary to the rules of construction employed by Federal Courts.

> "Of two constructions of a public law, both fairly possible, courts of law will adopt that which equity would favor."
>
> *Washington R. R. vs. Coeur D'Alene Ry., 160 U. S. 101.*

As a matter of fact, Section 26, National Prohibition Act, in so far as it relates to the protection of an owner, in possession or out of possession, of a vehicle seized does not admit of two constructions. It is plain that he is to be protected upon "good cause" being shown; but, for the purpose of this argument, let us assume that either one of two constructions is fairly possible. One construction would be that upon the owner showing good cause, he is

entitled to relief from the seizure of his property; the other is that while the right to relief, in these circumstances is plainly indicated, no specific procedure has been provided, as in the case of the lienor, and consequently the owner is without remedy and he must suffer a total loss of his property.

Need we hesitate for a moment as to which construction equity would adopt? Had it been the practice of equity to hesitate in situations of this sort, our equity jurisprudence would either never have been written or it would convey doctrines far different from those that prevail.

In such a case, the right having been indicated, equity *would find* a remedy—a procedure. Moreover, if its hands were not tied by statutory enactments, in a case of this kind, equity would declare the existence of the right as well as apply the remedy.

The District Court has ignored this principle in deciding the instant cause:

> Where the language of a statute is clear, the statute is not open to construction.
>
> *Yerke vs. U. S., 173 U. S. 442;*
>
> *Hamilton vs. Rathbone, 175 U. S. 419.*

The National Prohibition Act is plain in that an owner of a seized vehicle who shows good cause is entitled to protection against confiscation of his property. To hold otherwise is to ignore the plain language of the statute.

Statutes should receive a sensible construction, such as will effectivate the legislative intention, and if possible, *avoid an unjust* or absurd conclusion.

In re Chapman, 166 U. S. 667;
Law Ow Bew vs. U. S., 144 U. S. 59;
Sioux City R. R. vs. U. S., 159 U. S. 360;
U. S. vs. Kirby, 7 Wall. 486.

(We use the word "sensible" as employed in the decisions; no offensive meaning is to be implied.)

A sensible construction of Section 26, National Prohibition Act, could but lead to the conclusion that it was the legislative intention to prevent the vehicle of an owner who "shows good cause" from being confiscated, without granting such owner any redress whatsoever. A sensible construction of said Act would give effect to the legislative intention to give such owner a remedy in the premises besides his right to sue a very probably insolvent debtor who had turned a criminal. A sensible construction of said statute would have resulted in avoiding the unjust conclusion that an innocent person who shows good cause, as provided by the statute, shall be punished without redress. A sensible construction of said statute would have avoided the absurd conclusion that while the Congress had provided for the protection of an innocent owner, he was not entitled to such protection because the Congress had failed to prescribe minute details of procedure, but instead had seen fit to give the Court a free hand in

dispensing justice to the owner in proportion to the good cause shown.

> Where a particular construction of a statute will work injustice or occasion great inconveniences, it is to be avoided in favor of another and more reasonable construction possible.
>
> *Knowlton vs. Moore, 178 U. S. 77.*

The particular construction of the National Prohibition Act, adopted by the District Court in this cause, worked great injustice. Another and more reasonable construction was possible—the opportunity was and is provided by the language of the statute itself.

> No statute ought to receive a construction that will render it nugatory, or which prescribes a rule utterly impracticable.
>
> *U. S. vs. Tappan, 11 Wheat. 426;*
> *The Palmyra, 12 Wheat. 15.*

The National Prohibition Act prescribes relief for *all owners* of seized vehicles who show good cause. The decision in the instant case renders nugatory this provision, save, *possibly,* to an extremely limited class of owners, but renders the property of the vast majority of innocent owners likely to become involved in cases of this character subject to confiscation without redress. As to practicability, the decision goes further and shuts the door upon all solutions, practical or impractical.

"Effect should be given to all the provisions of a statute."

Rhodes vs. Iowa, 170 U. S. 422;
Bernier vs. Bernier, 147 U. S. 246;
Beley vs. Naphtaly, 169 U. S. 361;
Rice vs. The Minn., etc. R. R. Co., 1 Black 378;
Platt vs. Union Pacific R. R., 99 U. S. 58.

Where a statute covers *all* of a class, and a decision limits its application to but a small number of that class, eliminating the majority from participation in the relief provided, *it does not give effect to all the provisions of a statute.* A statute that employs the word "owner" without qualification, embraces all persons whom the word, in the broadest generally accepted meaning of our language includes. The meaning so given to the word "owner" includes an owner out of possession (such as a conditional sales vendor) as well as an owner in possession. The decision in this case eliminates from the provisions of the statute conditional sales vendors out of possession of their property.

It is the duty of the Court to give effect to every word in a statute if it can be done without violating the intention of the legislature.

U. S. vs. Gooding, 12 Wheat. 477;
Bend vs. Hoyt, 13 Peters 272;
Market Co. vs. Hoffman, 101 U. S. 115.

The decision of the District Court in the instant case does not give effect to every word in the statute

in that it restricts the meaning of an unrestricted word when no legislative intention to do so is apparent. In fact the legislative intention is violated by such restriction, as the intent appears that the word "owner" is employed without qualification.

> Every word of a statute must, if possible, be given some effect; nothing is to be stricken out if it can be avoided; it is not to be presumed that the legislature intended any part to be without meaning.
>
> *Allen vs. Louisiana, 103 U. S. 84;*
> *U. S. vs. Temple, 105 U. S. 99;*
> *Montclair vs. Ramsdell, 107 U. S. 152;*
> *U. S. vs. Fisher, 109 U. S. 145;*
> *Murphy vs. U. Her., 186 U. S. 111.*

It was possible in this case to give effect to the language of the National Prohibition Act, providing that when an owner shows good cause his seized vehicle shall not be sold. The District Court refused to give any effect to that provision. Ignoring the provision has the effect of striking it out of the statute. The decision in this case renders meaningless that portion of the Act which provides that upon the owner showing good cause his seized vehicle shall not be sold.

5. Suggestions regarding protection of interests of conditional sales vendors.

By the foregoing we trust that we have shown that the conditional sales vendor, in circumstances such

as are presented by this case, has rights of property which are recognized and safeguarded by the provisions of the National Prohibition Act.

How are such interests to be cared for?

The District Court for Arizona, in its decision in the *Marshall Montgomery* case, says that "the difference between the provisions applicable to owners and those applicable to lienors is 'significant'."

The "significant" circumstances to which the Court refers seem to have appeared to it sinister, to have played an important role in arriving at the decision rendered.

It requires only a fair consideration of the provisions of Section 26, however, to show that there is nothing either "significant" or sinister in the fact that as to the "owner", the section makes no specific provisions as to what action the Court shall take, when he, the owner, has shown "good cause".

No doubt the framers of the law had in mind that an "owner", whether he be an owner in possession or one out of possession, such as a conditional sales vendor, has full title, and if the vehicle is returned to him, *there is nothing more to do.* No elaborate procedure need be prescribed.

Why should a Court accustomed to equity causes consider itself helpless when authorized by statute to deal justly with persons before it, merely because the statute does not point out in minute detail the

procedure that should be followed. Had the statute, in addition to declaring the right also prescribed the relief and the procedure in its administration, the Court would be limited by those provisions; but, as the right is declared without limiting provisions as to procedure, it would appear that the proper course for the Court to pursue would be to dispose of the matter presented as the "good cause shown" requires.

In most cases of intervention by a conditional sales vendor, the proper relief, we feel, would be to order the vehicle returned to such vendor.

The absence of procedure provisions as to an intervening "owner" and their presence in the case of an intervening mortgagee or other lienor, under the provisions of Section 26 of the National Prohibition Act, is not "significant" in the sense that it deprives the former of all or any rights to relief and grants such rights to the latter class. As we have said, a return of the vehicle to the "owner" is as full relief as he may expect, and pursuing such course is beset with no complications. The intervening owner already is clothed with title, and when the vehicle is returned to him he receives only that which he already owns.

Such is not the situation of the intervening lienor. It may be true that a chattel mortgagee, upon breach of terms of the mortgage by the mortgagor, may take possession of the mortgaged property, but this

is only for the purpose of better preserving his security.

Taking possession of the property does not vest title in the mortgagee. There remains still the interest of the mortgagor, which must be extinguished by foreclosure before the mortgagee can acquire title to the property as "owner".

Manifestly then, the Court could not, in an intervention by a mortgagee or other lienor under the provisions of Section 26, order the seized vehicle turned over to the intervenor. He has no title to it—*he is not the owner*—and he has but an interest in the property as security for the payment of the amount due him. To realize that amount the property may be sold. At the sale the mortgagee may buy it in for the amount of his claim and thus acquire title, but the sale must be had.

The framers of the National Prohibition Act substituted a sale of the mortgaged vehicle under procedure prescribed by the Act for foreclosure proceedings in accordance with State laws and the provisions of the mortgage. The reason is easily found. If a surplus remains out of the proceeds of the sale, after all *bona fide* liens have been paid, that surplus represents the defendant's interest in the property, which interest is confiscated by the Government.

In the case of *United States vs. Sylvester, supra,* the Court states the following conclusion respect-

ing the interpretation of Section 26 of the National Prohibition Act.

> "Fourth—A *bona fide* vendor or mortgagee, without having any notice that the vehicle was being used or was to be used for the illegal transportation of intoxicating liquor, shall be protected to the amount of his *bona fide* lien, as far as possible."

The Court classes the vendor with the mortgagee, both as lienors, for the reason, expressed elsewhere in the decision, that:

> "Seventh—In the fourth instance, after the *bona fide* lien and lack of notice or knowledge have been established, the vehicle should be sold at public auction, and after the costs, as provided by law, have been paid, the United States Marshal shall then pay, if possible, the amount of the *bona fide* lien in full to the proper person, and the balance, if any, shall be turned into the treasury of the United States.
>
> "(5) To grant this petition (a petition by a conditional sales vendor for return of a truck) would permit a lienor or mortgagee to profit by the transactions, and that result was never intended by the framers of the law. Cases may arise where the application of this rule would result in realizing an insufficient amount at the sale to pay the full amount of the *bona fide* lien; but where a substantial amount has already been paid, as here, on a new truck, undoubtedly the full amount of the balance due, plus the

costs, will be realized, so that the lienor will be fully protected.

"(6) Where, however, the amount paid by the purchaser is small in proportion to the purchase price, so that a large amount will have to be realized by the United States Marshal at the sale, and where the highest bid is insufficient to meet the costs and the amount of the *bona fide* lien, the United States Marshal shall then abandon the sale and report the facts to the Court for further instructions."

We have no inclination to quarrel with the above decision in any respect. The Court is too apparently striving to apply the law justly and to protect the interests of all concerned for us to assume a critical attitude. And the circumstances of the case before the Court perhaps fully warranted all the conclusions reached.

We think, however, that the Court has over-estimated the probability of more than the amount of the lien being realized at the sale.

The value of the automotive vehicles is affected largely by temperamental considerations. This is particularly true of non-commercial vehicles—so-called "pleasure cars";—a car that has been used is a *"second-hand"* car. No matter for how short a time it has been used, or how slightly it has been used, it is "second-hand", and its value, as compared with a new car, is greatly diminished. Then there is the matter of "Model". An automobile of 1922

Model is worth much less in 1923 than a Model of that year, although the 1922 Model car may never have been used. Perhaps the decline in value is not in proportion with the drop in that of a woman's hat or gown of last year's "style", but the phenomenon will help us to understand.

When actual use of an automobile is added to age the result in value reduction is startling. More startling yet is the diminution when the usage has been rough.

Those who decide to engage in the illicit liquor traffic are not likely to be gentle persons, and their treatment of things entrusted to them is not calculated to enhance their value.

In practice, what we are most likely to find in cases of this character is that the vehicle seized is dirty, dented, scratched, its outer parts and accessories broken, top in tatters, paint or enamel rubbed off, and not infrequently the engine and other mechanism damaged.

Such a vehicle, at forced sale in the same condition as when seized, will bring very little as a purchase price. It would have to be a very exceptional case where the amount realized would equal the balance due the conditional sales vendor.

On the other hand, if the vehicle is returned to the vendor and by him overhauled and rehabilitated and it is placed on the market for sale in the ordinary course of trade, the vendor may eventually

realize the balance due him—at least he will come nearer to it than he would from any proceeds derived from a Marshal's sale.

Whenever a vehicle is sold by the Marshal for an amount less than sufficient to defray the costs, as provided by law, and the vendor's claim, there is no defendant's interest to confiscate and the Government gains nothing—and in almost every instance the amount realized will be insufficient to meet both the costs and the vendor's claim, *and the vendor is the loser.*

In *United States vs. Brockley, 266 Fed. 1001*—a case where the petitioners for the return of an automobile seized under the provisions of Section 26, National Prohibition Act, showed that they had lent the automobile to the defendant without any knowledge that it was to be used or that the defendant intended to use it for the illegal transportation of liquor—the Court says:

> "Whether the property seized shall be confiscated and sold depends upon the facts appearing and whether the facts presented constitute good cause or reason to the contrary is a question addressed to the *judicial sense* and judgment of the Court. This provision in the act is not analogous, as was contended for by the Government's attorney, to that found in Section 3450 of the Revised Statutes (Comp. St. Sec. 6352) under which it has been held that the ignorance of the owner of a vehicle used by a

third person for the removal of goods with the intent to defraud the United States, will not save his property from confiscation. * * * From these cases, as well as from the general provisions of the revenue laws therein construed, it is conclusive that personal property voluntarily committed by the owner to the possession of a third person, for use by him, becomes subject to forfeiture absolutely, whether or not good cause appear to the contrary."

"The admitted facts in this case show ownership and want of knowledge on the part of the vehicle's owners as to the purpose for which the vehicle was to be employed. *Without any other attending circumstance, this is sufficient to warrant the Court to order its return.* It might be otherwise if, from the reputation of the person intrusted with the vehicle or other circumstances attending his occupation or employment, the inference might arise that the owners had reason to suspect that their property might be used for the purpose it was employed."

"The construction contended for by the learned representative of the Government would admit of no reason or cause for the return of property used in connection with a violation of the provisions of this statute, if such was intrusted to the violator of the same and used in connection therewith. *This would work greater hardship upon innocent owners of such property than was contemplated by the legislators; otherwise they would not have provided for the return on good cause shown.* (Italics ours.)

> "The order formerly entered is vacated, and the property seized, one Hudson touring car No. 632-971, *is to be delivered to the petitioners,* when storage and charges, if any, are paid by the owners."

In *McDowell vs. United States,* No. 3865, recently decided by this Court, it was held that Section 3450 Revised Statutes, had been repeated by the enactment of the National Prohibition Act, and that the harsh conditions of confiscation provided by Section 3450 no longer applied in a case such as that now at bar.

Notwithstanding this and notwithstanding decisions in Federal Courts of other jurisdictions, showing an inclination to apply the milder and more just provisions of the National Prohibition Act to cases of this nature, the District Court for Arizona and the District Court for the Northern District of California, in this case, have virtually "re-enacted" Section 3450 in all its serenity. We contend that in so doing the said Courts have gone far beyond their authority.

It will be seen that in interpretation the Court in the Sylvester case was in accord with the Brockley case—only in the disposition of the vehicle do they differ. In fact, they do not differ so much even in that respect, for it may be fairly implied that in a case which would appear proper to the District Court for Connecticut it would return the vehicle to the owner instead of ordering it sold and the

owner's claim paid from the proceeds of the sale. They are one, however, on the proposition that an owner who voluntarily parts with possession of his property, which is afterward without his knowledge used for the illegal transportation of liquor, has a right to protection, and that his vehicle cannot be confiscated upon good cause being shown.

As we have already indicated, we think that a return of the vehicle to the owner, in such circumstances, is the course most likely to promote practical justice, and we urge that the practice be approved.

In the Brockley case, the owners were out of possession of the automobile when it was used for the illegal transportation of liquor, because they had *lent* it. We do not think that, for a case such as this, they were in a materially different position from an owner who has parted with possession under a conditional sales contract—only that if any inferences as to innocence and want of knowledge on the part of the owner is to be indulged in, it favors the conditional sales vendor.

One who lends so valuable a chattel as an automobile to another, without pay, must know him fairly well, and there is consequently more reason to suspect that the lender has a more intimate knowledge of the borrower's character and business than could be expected from a conditional sales vendor as to his vendee, and for that reason the equities in favor

of a conditional sales vendor are even greater than those of a lender.

Our view is that the framers of the National Prohibition Act intended to give the Court a free hand in all cases where an "owner" has shown "good cause" to deal with the situation as the circumstances warrant and that, therefore, it is unnecessary to lay down any rigid rule which must be adhered to in every case. We feel that if the Court is satisfied that nothing above the costs and the vendor's claim will be realized by a sale, the Court may return the vehicle to the vendor. If it is apparent that enough will not be realized from such sale to meet these two items, then the Court should order the vehicle returned to the vendor upon his paying the costs. If a case arises where it is likely that more will be realized than the aggregate of costs and the vendor's claim, then the rule laid down in *United States vs. Sylvester* would, no doubt, be the one to follow. The Court is not bound by the provisions of State laws prescribing the status, rights and obligations of parties to conditional sales contracts, in proceedings of this character, but it may look beyond the mere words of the instrument and construe the status of the claimant as a lienor instead of an owner.

CONCLUSION

We earnestly ask for the following conclusions in this case:

1. That there is no provision in the laws of California that renders a decision in this case different from decisions in similar cases in other jurisdictions necessary or proper.

2. That State laws have no governing force in determining the status or the rights of the petitioner in this case.

3. That the District Court has misinterpreted the National Prohibition Act and the rights granted by it to petitioner, when determining this cause.

4. That the District Court in determining this cause has placed a construction upon the National Prohibition Act that is not warranted by its terms and has employed standards of interpretation that are contrary to the rules of interpretation employed by Federal Courts.

5. That as to owners of seized vehicles the Court is vested with discretion as to procedure to attain the objects of the National Prohibition Act in that respect and that it is the object of said Act to protect innocent vendors from loss as far as possible and that Courts should act with that end in view.

And, as a consequence of said conclusions, we respectfully request that this Court annul and overrule the order heretofore made and entered in this cause

by the United States District Court for the Northern District of California, on April 14th, 1923, and that this Court grant the prayer of the petitioner for the return to it of the personal property described in its petition herein; or, if this Court be of the opinion that a return of said property is not the proper relief to be granted the petitioner, then that this Court order that petitioner have a lien upon the proceeds derived from the sale of said property to the amount due under its contract of conditional sale and that said amount be paid to petitioner, after deducting from the amount realized from the sale of said property the costs, as provided by law, and that in the event the remaining sum, after deducting said costs, be not sufficient to pay petitioner's claim in full, then that the whole of said balance, after deducting the costs, as aforesaid, be paid over to the petitioner.

Respectfully submitted

P. R. LUND,

Attorney for Appellant.

San Francisco....JUNE..., 1923.

APPENDIX

In the Southern Division of the United States District Court, for the Northern District of California.

First Division.

No. 12871.
No. 12188.
No. 12296.
No. 12957.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DANIEL BELLI,
Defendant.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GUISEPPE CAPACIOLI,
Defendant.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

E. O. KILDALL, et al,
Defendants.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JACK MODESTI,
Defendant.

ORDER DENYING MOTION

PARTRIDGE, JOHN S.

In each of the above entitled causes the defendants duly pleaded guilty and were punished for the illegal transportation of liquors contrary to the provisions of the National Prohibition Statute. In each case the liquor was found in an automobile and the automobile was seized and confiscated by the Government. The defendant in each case was in possession of the automobile by virtue of a contract of sale by which the title to the automobile was retained by the vendor, said title not to pass to the defendant until the payment of certain specified sums of money. All of these contracts were in the form of conditional sales, long recognized under the law of California.

In the first three causes the matters are before the Court on petitions for return of the automobile by the vendor. In the last cause, however, the vendor does not ask for the return of the automobile, but applies for an order establishing a lien upon the proceeds of the sale, to the extent of the balance of the unpaid purchase price.

Section 26 of the National Prohibition Law provides: "Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer, he shall take possession of the vehicle and team, or automobile * * * and shall arrest any person in charge thereof. The courts upon conviction of the person so arrested, shall order the liquor destroyed and, unless good cause to the contrary is shown by

the owner, shall order a sale by public auction of the property seized, and the officer making the sale * * * shall pay all liens according to the priority, which are established as being *bona fide* and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of the liquor."

It is not by any means easy to reconcile the decisions upon Section 26 of the Act. Judge Thomas, District Judge of the District of Connecticut in *United States vs. Sylvester, 275 Fed. 253* allowed a lien for the amount of the unpaid purchase price under what the opinion calls "a conditional bill of sale," although he denied the return of the automobile. The opinion seems to treat the unpaid purchase price as a lien upon the property. He denied the petition for the return of the automobile, however, upon the theory that that would permit "a lienor or mortgagor to profit by the transaction and that result was never intended by the framers of the law."

Quite recently Judge Dooling of this District, sitting in the District of Arizona, in the *United States vs. Marshall Montgomery, et al.,* held distinctly and emphatically that the vendor under a conditional bill of sale has no lien upon the automobile. He gives this as his reason: "It is not unreasonable to suppose Congress had in mind the fact that an owner may determine who shall have the use of a

to suppose Congress had in mind the fact that an owner may determine who shall have the use of a vehicle and thus, in a measure, control such use, while a lienor may not, because he is at no time entitled to its possession."

It seems to me that this is clearly the proper rule to apply in a case arising under a contract of conditional sale made and to be performed in the State of California. It is perfectly well settled in this State that under one of these conditional contracts for the sale of personal property, the title remains in the vendor and if the property is destroyed, the loss falls upon him. *Potts Company vs. Benedict, 156 Cal. 322; Waltz vs. Silveria, 25 Cal. Ap. 717.* It is equally well settled that the vendor has his option of either of two remedies upon the failure of the vendee to pay the balance of the purchase price.

First, he can take back the property because the title is still in him;

Second, he can waive this right, treat the sale as absolute, and sue for the balance; but he cannot do both. *Park & Lacey Company vs. White River Lumber Company, 101 Cal. 37; Holt Manufacturing Company vs. Ewing, 109 Cal. 353; Waltz vs. Silveria, supra; Muncy vs. Brain, 158 Cal. 300; Adams vs. Anthony, 178 Cal. 158.*

Reference was made on the argument and the submission of authorities to the recent case of *McDowell vs. United States No. 3865,* decided by the Circuit Court of Appeals for this Circuit on February 5th. In that case, however, the real question involved

was whether *Section 3450* of the Revised Statutes had been repealed by the provisions of the National Prohibition Act. It was clearly recognized that under *Section 3450,* the conveyance in which goods were moved in an attempt to defraud the United States of a tax was absolutely forfeited, whether or not the person so conveying the goods was the actual owner of the vehicle or not. In that case the Court says that this provision of the Revised Statutes was in effect repealed by *Section 26 of the National Prohibition Act.* It is therefore apparent that unless language is found in Section 26 which would relieve the vendor under a conditional bill of sale from the provisions of forfeiture and sale, that those latter provisions would authorize the Government to seize and sell the conveying vehicle. As Judge Dooling points out in his decision, no such language is found.

It is clear to me, therefore, that at least in California, the following conclusions are inevitable:

1. The vendor under a conditional bill of sale retaining title to the property in himself cannot compel the return of the property by the Government;

2. Such a vendor has no lien upon such a vehicle for the very simple reason that he is the owner thereof.

The motions, therefore, in each case will be denied.

Dated: April 14, 1923.

(Endorsed): Filed April 14, 1923.

WALTER B. MALING, *Clerk.*

By C. W. CALBREATH, *Deputy Clerk.*